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No. 85-275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CARLOS G. GAY

Petitioner,

v.

COATS & CLARK, INC.
and
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
and
WHIRLPOOL CORPORATION
and
ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INSURANCE COMPANY

Respondents.

On Writ of Certiorari to the United States Court of Appeals, Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether certiorari should be denied by the United States Supreme Court because Petitioner has failed to establish special and important reasons warranting the exercise of this Court's discretion.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below subject to this Petition for Writ of Certiorari are set forth in the caption of the petition.

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---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The March 25, 1985, opinion of the Eleventh Circuit Court of Appeals, is reported at 755 F.2d 1506. The order denying petition for rehearing and the judgment of the United States District Court for the Middle District of Georgia, entered December 14, 1983, are unreported, but may be found in the appendixes to the Petition for Writ of Certiorari, appendix F and C, respectively.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions, each of which, in pertinent part, is set forth below:

U.S. Const. amend. V

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

Title 28, United States Code
Section 1254(1)

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> 1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of the judgment or decree;

Title 28, United States Code,
Section 455(a)

> Any justice, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

United States Supreme Court Rule
17.1(a)

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

Respondents believe that the Statement of the Case as set forth in the Petition for Writ of Certiorari is adequately presented.

ARGUMENT

DENIAL OF CERTIORARI IS APPROPRIATE BECAUSE PETITIONER HAS NOT SHOWN GOOD CAUSE WARRANTING THE EXERCISE OF JUDICIAL DISCRETION BY THE UNITED STATES SUPREME COURT.

The Petitioner has not shown to the Supreme Court that the present litigation involves "special and important" issues which would justify the granting of certiorari. Because the issuance of a Writ of Certiorari is discretionary, Petitioner carries the heavy burden of establishing that his case presents special and important reasons why the petition should be granted. The Writ of Certiorari should be granted only in cases of importance to the *public,* as distinguished from that of the *parties,* and where there is a real and embarrassing conflict between the Circuit Courts of Appeal. *Layne & Bowler Corp.* v. *Western Well Works,* 261 U.S. 387, 393 (1923). Petitioner attempts to meet this burden by contending that (1) "the opinion of the 11th Circuit below conflicts with prior opinions of [the Supreme] Court, . . . and of other circuits . . ." on the same matter, and (2) the decision by the 11th Circuit sanctioned " . . . unacceptable judicial conduct in the trial court below, mak[ing] it an appropriate case . . ." for the exercise of the supervisory powers of the Supreme Court. With all due respect, however, there is no conflict between the Eleventh Circuit and any other Circuit, the Petitioner has shown no special and important *public* reasons why this petition should be granted, and the United States Supreme Court should reject the petition for certiorari.

A. Denial Of Certiorari Is Appropriate Because There is No Conflict Between The Eleventh Circuit Court Of Appeals And Other Federal Circuit Courts As to Standards of Judicial Impartiality.

The Petitioner suggests that the guidelines with respect to judicial impartiality applied by the Eleventh Circuit Court of Appeals in this case conflict with the guidelines applied by its sister Circuit Courts of Appeal, and by this Court. The Petitioner contends that *Quercia* v. *United States,* 289 U.S. 466

(1933), sets the standard for judging judicial impartiality. Petition for Writ of Certiorari (hereafter, "Petition"), p. 10. The Petitioner ignores, however, that *Quercia* was recognized as the proper standard by the Eleventh Circuit Court of Appeals in this case. *Coats & Clark, Inc.* v. *Gay,* 755 F.2d 1506, 1512 (11th Cir. 1985). Thus, the standard which Petitioner advocates was applied.

The Petitioner, in his zeal to find error, attempts to revise the standard set forth in *Quercia* by carefully ignoring important portions of the opinion. The standard governing judicial conduct during a trial is not so narrow and simplistic as Petitioner would have the Court believe. The Respondents agree that the trial judge's influence on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' *Quercia,* 289 U.S. at 470. Absent from Petitioner's analysis of the *Quercia* test, however, are additional considerations which permit a trial judge considerable latitude and discretion when conducting a trial. In *Quercia,* this Court held that ". . . the judge is not a mere moderator, but is the governor of the trial for the purposes of assuring its proper conduct and of determining questions of law." *Id.* at 469. Moreover, in another case cited by Petitioner in support of his argument, the Second Circuit Court of Appeals recognized that "[e]very judge has his own individual manner of conducting a trial and, of necessity, must have great leeway in so doing. Even appellate decisions cannot reduce the judicial personality to a common colorless denominator." *United States* v. *Grunberger,* 431 F.2d 1062, 1067 (2d Cir. 1969) (quoting Judge Moore, dissenting in *United States* v. *Guglielmini,* 384 F.2d 602, 608 (2d Cir. 1967)). In *Quercia,* this Court further said that ". . . it is within [the trial judge's] province, whenever he thinks it necessary, to assist the jury at arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes clear to the jury that all matters of fact are submitted to their determination." *Quercia,* 289 U.S. at 469. And finally, to use language from another case

cited by Petitioner, "... the trial judge should be permitted considerable attitude (sic) in dealing with counsel, ruling on objections, and keeping the trial moving ..." *United States* v. *Ah Kee Eng*, 241 F.2d 157, 161 (2d Cir. 1959).

Although the full *Quercia* test was not properly delineated by Petitioner, the Eleventh Circuit Court of Appeals clearly balanced all of the above-cited factors when reaching the decision that "[t]here was no plain error requiring a reversal." *Coats & Clark, Inc.*, 755 F.2d at 1512. The court not only cited the language in *Quercia* upon which the Petitioner relies most heavily, *id.* at 1512, but the court also recognized that

> [A] federal judge is not a "mere moderator of proceedings." (Citations omitted). Rather, he possesses broad powers to "comment on the evidence, . . . question witnesses [in order to] elicit facts not yet adduced or clarify those previously presented, . . . and [to] maintain the pace of the trial by interrupting or cutting off counsel as a matter of discretion . . .
>
> One of the most demanding tasks of a trial judge is to keep a trial within proper bounds and to move it along as expeditiously as the ends of justice will permit, without taking frequent recesses to admonish witnesses or counsel in the absence of the jury. Firm but impartial [illegible]ds are required. *Id.* at 1512.

Thus, it is clear that the Eleventh Circuit Court of Appeals, Second Circuit Court of Appeals, and other Circuit Courts of Appeal are adhering to the rule of law set forth in *Quercia* in 1933. Petitioner's contention that the opinion of the Eleventh Circuit is in conflict with this Court, as well as the Second Circuit and others, is without merit. Petitioner's petition for certiorari to the Supreme Court is based on nothing more than a disagreement as to the application of the uniform "standard."

Petitioner's frustration with the application of the *Quercia* test is no more evident than in the extensive discussion in his brief in which Petitioner "... suppose[s] that the Second Circuit would have reversed under these facts." Petition, p. 16.

Petitioner cites five categories of judicial misconduct which he feels are unique to the Second Circuit: (1) marked impatience, (2) contrasting treatment of witnesses, (3) criticism of counsel, (4) mentioning of insurance company and (5) derogation of defendant's testimony. This brief in opposition will not address these assertions at this time because these points of law are more appropriately addressed in the discussion concerning the exercise of the supervisory powers of this Court.

B. Denial Of Certiorari Is Appropriate Because The Decision By The Eleventh Circuit Court of Appeals Did Not Sanction A Departure From The Accepted Course Of Judicial Proceedings Warranting The Exercise Of The Supervisory Powers Of This Court.

Petitioner contends that the trial judge gave the impression to the jury that the court was prejudiced against his case, thereby denying Petitioner his constitutional right to a fair trial. The task of establishing this allegation is made more onerous, however, by his counsel's failure to make timely objections during the course of the trial. Thus, the Eleventh Circuit Court of Appeals properly recognized that the trial court was not afforded an opportunity to correct itself, if it committed error, and stated that "[a]though not precluded, appellate review is limited to review for plain error." *Coats & Clark,* 755 F.2d at 1511 (quoting *Newman* v. *A. E. Staley Mfg. Co.,* 648 F.2d 330, 335 (5th Cir. 1981).

In support of his contention, Petitioner lists five different categories of judicial misconduct which he alleges are present in the case at bar. The incidents to which Petitioner refers do not show antagonism or partiality, however, but rather show nothing more than the trial court exercising its discretion in controlling the trial proceedings. *United States* v. *Socony-Vacuum Oil Company,* 310 U.S. 150, 230 (1940); *Swift* v. *Southern Railway Company,* 307 F.2d 315, 321 (4th Cir.

1962). Thus, in a unanimous decision, the Eleventh Circuit Court of Appeals, upon reviewing the *whole* record, held that

> [t]he context in which the judge's remarks were made makes it clear that [Petitioner] displayed a pattern of evasiveness while on the stand, which mandated firm intervention by the court. Understandably, the judge's remarks grew somewhat harsher as [Petitioner] persisted in his habit of evading the questions or responding to simple questions with extended remarks tailored to his self-interest . . . We are left with the impression that the trial court's impatience was justified.

Coats & Clark, Inc., 755 F.2d at 1512.

Petitioner admits that "each case turns on its own facts and the actions of the trial judge [in the present litigation] may not rise to the same level as those [cases] criticized in any one of the specific [aforementioned] categor[ies]." Petition, p. 16. The cases cited by Petitioner involve instances of judicial impropriety far more egregious than any possible construction that could be given to the trial judge's conduct in the case at bar. This Court wisely stated in *Glasser* v. *United States*, 315 U.S. 60 (1942) that "[w]e must guard against the magnification on appeal of instances which were of little importance in their setting." *Id.* at 82. This Court "should [also] be loath to read too much into the cold black and white of a printed record." *Ah Kee Eng*, 241 F.2d at 161.

The following paragraphs will respond to the five categories cited by Petitioner. The evidence will show that the decision by the Eleventh Circuit Court of Appeals did not sanction a departure from the accepted course of judicial proceedings.

1. Marked Impatience.

The trial judge is empowered with great discretion to keep a case moving within bounds of reason, *Socony*, 310 U.S. at 230; *Swift*, 307 F.2d at 320, especially when concerning the extent of cross-examination, *Alford* v. *United States*, 282 U.S. 687 (1931), and the refusal of testimony that is "merely cumulative in nature." *Socony*, 310 U.S. at 230. Continued questioning on matters already covered in detail may require

judicial admonition of counsel. *Miley* v. *Delta Marine Drilling Company,* 473 F.2d 856, *rehearing denied* 572 F.2d 1405, *cert. denied* 414 U.S. 871, 94 S.Ct. 93, 38 L.Ed.2d 89 (1973).

Petitioner erroneously contends that the trial judge abused this discretion. Petitioner's reliance upon *United States* v. *Coke,* 339 F.2d 183 (2d Cir. 1964) as direct authority in support of his argument is unfounded if for no other reason than in *Coke,* counsel made timely objection. The standard of review was not one of plain error, as it is in the present case. Moreover, while marked impatience was one of the elements cited by the Second Circuit Court of Appeals, the *Coke* court seemed to attach great importance to the trial judge's repeated rebukes and disparaging remarks that were directed at defense counsel, factors not present in the trial of the case at bar.

Petitioner cites several alleged instances of impatience which will be addressed in the order in which they appear in the Petition. First, Petitioner contends that he was denied his right to a fair trial and deprived of due process of law by the trial court's unequal treatment of witnesses. Respondents were allowed to present a witness out of turn "because of difficulties about a witness not being available right at this minute." T-610, L.12-23, reprinted at App. A., p. A-1. Petitioner maintains that the trial court should have reciprocated this flexibility, later in the trial, when one of Petitioner's witnesses was late. It is not an abuse of discretion, however, for a court to adhere to a policy of not delaying trial to wait for a witness, *Maxey* v. *Chapman,* 224 F.2d 574 (8th Cir. 1955); *Schwartz* v. *Koutsubo,* 345 F.Supp. 1018, aff'd 485 F.2d 681 (D.C.Pa. 1972), but the policy should be applied evenly to both parties.

The trial court's failure to delay the trial for Petitioner was not an abuse of discretion. The trial court did not recess the trial for plaintiff's counsel, but merely agreed, with consent of opposing counsel as Petitioner suggests, to present a witness out of turn. Petitioner, however, off the record, asked the court for a recess. Thus, the situations are clearly distinguishable and the trial court applied evenhandedly the policy

of not delaying the trial to wait for a witness. Furthermore, Petitioner ignores the fact that ultimately the recess requested by Petitioner's counsel was granted. T-1207, L. 25 through T-1208, L. 5, reprinted at App. A, p. A-2.

After the trial court's preliminary denial of Petitioner's motion for recess, Petitioner was called to the stand on his own behalf for the second time. His testimony in this appearance concerned matters which had already been ruled irrelevant by partial summary judgment dismissing Petitioner's counterclaim. *Coats & Clark, Inc.*, 755 F.2d at 1509-1511. The trial court, therefore, was well within its discretion in commenting to defense counsel that the impending testimony was "merely cumulative in nature." *Socony*, 310 U.S. at 230. It is noteworthy that when the court finally relented from its refusal to delay the trial for the tardy witness, defense counsel made no effort to bring the Petitioner to the stand for further testimony. Moreover, after considering the record as a whole, the Eleventh Circuit Court of Appeals, without dissent, concluded that ". . . after a careful review of the cold, lifeless record, we are left with the impression that the trial judge's impatience was justified." *Coats & Clark, Inc.*, 755 F.2d at 1512.

2. Contrasting Treatment of Witnesses.

It is within the sound discretion of the trial court to elicit truth, *United States* v. *Breen*, 96 F.2d 782, 784 (2d Cir. 1938), to limit repetitious or cumulative testimony in interest of moving along the trial, *Socony*, 310 U.S. at 230, to clarify evidence previously presented, *Moore* v. *United States*, 598 F.2d 439, 442 (5th Cir. 1979), and to comment on the evidence. *Quercia*, 289 U.S. at 470. Each and every excerpt cited by Petitioner exemplifies the proper exercise of discretion by the trial court. A review of the following excerpts will reveal that Petitioner was not denied a fair trial and that the trial court's comments were "largely justified, . . . mandat[ing] firm intervention by the court." *Coats & Clark, Inc.*, 755 F.2d at 1512.

Petitioner unfairly juxtaposes a moment of levity between the trial court and Respondent's counsel against an instance

in which the trial court admonished Petitioner's counsel for spending 40 minutes on a 10-minute witness. Petition, p.20. Not only was the trial court well within its judicial discretion in admonishing Petitioner's counsel so as to move the trial along, but the record is replete with instances in which the trial court was equally as lighthearted with Petitioner. *See e.g.,* T-150, L.9 through T-151, L-4, reprinted at App. A, p. A-3.

Petitioner claims that the trial judge "help[ed] plaintiff's expert . . . avoid defendant's cross-examination," and thereby contributed to the denial of a fair trial before an impartial jury. Petition, p.20. Petitioner claims that not only did the trial judge suggest a means by which the witness could avoid answering a question, but that the witness' later denial of any knowledge concerning the question can be attributed to the trial court's suggestion. Petition, p.21. Petitioner has failed to inform this court, however, that the jury was absent at the time of this exchange and that the witness offered a comprehensive and detailed explanation for his lack of knowledge. T-366, L.8 - T-368, L.4, reprinted at App. A., p. A-4.

Petitioner's next two contentions relate to the trial court's handling of two expert witnesses appearing on behalf of Petitioner. Petitioner claims that the trial court was "pre-dispos[ed] to grant [a] new trial if [Petitioner's] 'contaminated' expert, Adams," testified and plaintiff subsequently lost the trial. Petition, p. 22. A careful reading of the record, however, will show that the trial court merely stated that if Petitioner's expert had been present in the court room during other testimony on matters in which Petitioner's expert was to testify, Respondent's counsel would ". . . have *basis* for a motion for a new trial" (emphasis added). T-1186, L.1-6, reprinted at App. A, p. A-6. Moreover, when the trial court, on its own motion, excluded Adams' irrelevant testimony concerning the maintenance procedures on sprinkler systems used at nuclear reactors, the court was well within its discretion. T-1213, L.5-16, reprinted at App. A, p. A-7. It is not error for a trial court to exclude evidence without objection, on its own motion. *Alquero* v. *Duenas,* 319 F.2d 40, 42 (9th Cir. 1963). The trial court's treatment of Petitioner's main

expert, Donnelly, was also within the trial court's broad discretion to move the trial along and exclude irrelevant material. T-1132, L.2-22, reprinted at App. A, p. A-8. *Socony*, 310 U.S. at 230; *Miley*, 573 F.2d at 857.

Respondents do not deny that their counsel used the term "believed" at various instances in his cross-examination of the Petitioner. Petitioner's counsel, however, did not object to the use of the term. Later in the trial, the trial court did not "encourag[e] plaintiff's counsel to object to" the use of the term "believed" by one of Petitioner's witnesses. Petition, p.23; T-1201, L.10 through T-1203, L.1, reprinted at App. A, p. A-9. Any gratuitous motions by the trial court were well within the trial court's sound discretion to clarify the evidence for the benefit of the jury. *Moore*, 598 F.2d at 439; *Alquero*, 319 F.2d at 42.

A careful reading of the remainder of the excerpts cited by Petitioner will reveal that in each and every instance, the trial judge was well within his sound discretion to clarify and comment on the evidence, *Quercia*, 289 U.S. at 470, to elicit truth by cross-examining witnesses, *United States* v. *Breen*, 96 F.2d at 784, and to maintain the pace of the trial. *Moore*, 598 F.2d at 493. Petitioner contends that the trial judge abused this discretion and cites *United States* v. *Grunberger*, 431 F.2d 1062 (2d Cir. 1969) as support for this proposition. Petitioner's reliance on *Grunberger*, however, is tenuous because the holding in *Grunberger* was not based solely on even primarily on contrasting treatment of witnesses. Petition, p.19. In *Grunberger*, in addition to extensively questioning witnesses on his own, the trial judge improperly charged and usurped the function of the jury by indicating that a particular statement by defendant was an admission of guilt. *Grunberger*, 431 F.2d at 1069. The prosecutor was also allowed to state his personal opinion as to the credibility of the evidence. *Id.* at 1068. In the case at bar, however, at no time did the trial court usurp the jury's function or become an advocate for the plaintiff. Upon review of the whole record, the Eleventh Circuit Court of Appeals was ". . . not convinced that the jurors may have perceived the trial judge as partial

toward the plaintiff and biased against the defendant." *Coats & Clark, Inc.*, 755 F.2d at 1512.

3. Criticism of Counsel.

Petitioner has mischaracterized the relationships between the trial court and the counsel for the two parties. The record will show that plaintiff's counsel did not enjoy a "joking relationship" with the trial judge, Petition, p. 27, nor was there a "running battle" between the court and defense counsel, *United States* v. *Persico*, 305 F.2d 534, 540 (2d Cir. 1962), in which the bench "belittle[d] and humiliate[d] counsel in the eyes of the jury." *Ah Kee Eng*, 241 F.2d at 161. With all due respect, it is important to note that Petitioner's present counsel was not present at the trial and these contentions are, therefore, based on a "cold, black and white of a printed record." *Id.*

Most of the interjections by the trial judge to which Petitioner objects were "largely justified." *Coats & Clark, Inc.*, 755 F.2d at 1512. As was more fully described in the section concerning marked impatience, *supra*, the trial judge's reference to "filibustering" was prompted by defense counsel's purposeful delaying of the trial. T-1199, L.21 through T-1200, L.6; T-1203, L.17 through T-1204, L.6, reprinted at App. A, p. A-11. Moreover, because Petitioner was recalled to testify as to matters that were irrelevant and cumulative in nature, *Coats & Clark, Inc.*, 755 F.2d at 1509-1512, the trial court was well within its discretion to exclude Petitioner's testimony. *Socony*, 310 U.S. at 230.

Petitioner further contends that the trial court damaged the credibility of his counsel at trial through "caustic" and accusatorial remarks. Petition, p. 28. It is clear from a reading of the trial record that the trial court was merely trying to be evenhanded with both parties. The statement to which Petitioner objects was made immediately after a bench conference, which presumably was to discuss propriety of the line of questioning by the Respondent's counsel. The trial court was, therefore, within its discretion to maintain the pace of the trial. T-1119, L.25 through T-1120, L.14, reprinted at App. A, p. A-12.

The remainder of Petitioner's contentions concerning criticism of counsel, are purely speculative. A fair reading of the excerpts cited by Petitioner will show that the trial court was evenhanded in his treatment of the parties involved and had no effect on the perceptions of the jury.

The failure of Petitioner's trial counsel to timely object during the trial causes Petitioner to carry the heavy burden of establishing plain error. *Newman,* 648 F.2d at 335. Moreover, Petitioner admits that the cases which he cites for authority involve ". . . more egregious circumstances than the record here . . ." reveals. Petition, p. 27. Hence, the Eleventh Circuit Court of Appeals found that most of the comments to Petitioner's counsel were "largely justified." *Coats & Clark, Inc.,* 755 F.2d at 1512.

4. Mentioning of insurance company.

Petitioner contends that the case of *Brown* v. *Walter,* 62 F.2d 798 (2d Cir. 1933) stands for the proposition that if a trial judge, during voir dire, mentions that a certain insurance company is an interested party, grounds exist for a new trial. Petition, pp. 32-33. Petitioner's reading of *Brown* is strained. Voir dire questioning rests in the sound discretion of the trial court. *Hinkle* v. *Hampton,* 388 F.2d 141, 144 (10th Cir. 1968). During voir dire by the trial court, questions were asked concerning the insurers of both parties, and no objection was raised. T-19, L. 9-24, reprinted at App. A, p. 13. Moreover, at no other time during the trial did any of the parties, including the trial judge, make mention of Petitioner's insurer.

5. Derogation of defendant's testimony.

Petitioner claims that the trial judge undermined his credibility during the trial. The excerpts to which Petitioner cites do not justify this conclusion. Indeed, the United States Court of Appeals held that "[t]he context in which the judge's remarks were made makes it clear that [Petitioner] displayed a pattern of evasiveness while on the stand, which mandated firm intervention by the court. Understandably, the judge's remarks grew somewhat harsher as [Petitioner]

persisted in his habit of evading questions or responding to simple questions with extended remarks tailored to his self-interest." *Coats & Clark, Inc.*, 755 F.2d at 1512. *See e.g.*: T-1200, L.18 through T-1201, L.20, reprinted at App. A, p. A-14.

Petitioner's reliance on *Quercia* and *United States* v. *Salazar*, 293 F.2d 442 (2nd Cir. 1961) is misplaced. In *Salazar*, the trial court made "gratuitous and unnecessary comments which sarcastically and relentlessly discredit Salazar." *Salazar*, 293 F.2d at 444. Petitioner admits that the trial court's conduct does not "fit squarely within the ambit of either *Quercia* or *Salazar*," and that the trial court's "comments and conduct toward [Petitioner] were less than direct and not totally unprovoked." Petition, p.36.

It is apparent from the previous discussion that the denial of certiorari is appropriate because the decision by the Eleventh Circuit Court of Appeals did not sanction a departure from the accepted course of judicial proceedings. "Although the trial judge stepped close to the line of neutrality in this case . . ." a unanimous panel of the Eleventh Circuit Court of Appeals held that the trial court did not abuse its discretion. *Coats & Clark, Inc.*, 755 F.2d at 1512. With all due respect, the major purpose of the supervisory power is to protect the integrity of the court, rather than vindicate a constitutional right of a defendant. *United States* v. *Payner*, 447 U.S. 727, 747 (1980) (dissenting opinion). For the reasons stated herein, therefore, the decision of the Eleventh Circuit Court of Appeals did not and does not undermine the integrity of the judicial system.

CONCLUSION

For the reasons stated, plaintiff respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

T-610, L. 12-23

THE COURT: Now, members of the jury, the plaintiffs have not quite presented all the evidence that they want to present. But because of difficulties about a witness not being available right at this minute, the defendants are going to go ahead and start presenting the defendant's evidence. But the plaintiff is still going to introduce a little more evidence after lunch today. In other words, they have not completed their case but they have almost completed it. And so that we may go ahead without delay, the defendants are going to go ahead and then we'll break back in after lunch and let the witnesses for the plaintiff be heard.

T-1207, L. 25 through T-1208, L. 5

THE COURT: All right. I said I wasn't going to do it, but I'm going to do it. We're going to wait just a few minutes and see if the witness who is supposed to have been here gets here. So we'll take a little short break so that you can be more comfortable.

(Brief Recess)

T-150, L. 9 through T-151, L. 4

Q. Mr. Gay, let me show you something that's been marked as Plaintiff's Exhibit 6 in this case, and it purports to be a diagram of the General Bonded Warehouse showing where cotton was stored. It's a diagram that was drawn for us by your son-in-law, Mr. Randall Hatcher. Do you recognize it as being such a diagram?

MR. ECKL: Your Honor, he probably wouldn't know. We would agree that it is.

MR. WITHERS: I believe he was present at Mr. Hatcher's deposition.

THE COURT: Well, your lawyer says that he will agree that that is a diagram. Are you willing to agree with your lawyer?

THE WITNESS: I'm the one that's got to tell the truth.

THE COURT: That's right, the lawyer doesn't have to tell the truth.

(Laughter)

THE COURT: That's one of the fringe benefits.

THE WITNESS: You make me regret I didn't become a lawyer.

T-366, L. 8 through T-368, L. 4

MR. ECKL: Can I ask him some questions before we take him down and then later if the Court rules that those questions are admissible just read them to the jury rather than spending a lot of time having Mr. Thomas—

THE COURT: You can go ahead and ask him about them, and you can handle it that way. But I don't think I'm sufficiently informed about it to rule on the admissibility right now.

MR. ECKL: If everybody has no objection to that, then we'll just kind of take it a little series of questions here, and if the Court later rules that they're admissible—

THE COURT: The witness may say he doesn't know anything about it anyway. That would solve the whole thing, wouldn't it?

MR. ECKL: Please don't suggest to him—

THE WITNESS: Well, I've heard enough.

MR. WITHERS: Just so the record's clear, I have no objection to that procedure. Obviously the objection to the documents are reserved.

MR. ECKL: Let's make sure that the record reflects that the jury is not presently in the Courtroom as I ask this series of questions.

BY MR. ECKL:

Q. Mr. Thomas, I'm going to hand you Defendant's Exhibit Number 4 and I'll ask you whether or not that's a form with which you are familiar.

A. No, sir, it is not. I've never seen one of FM's forms to tell you the truth.

Q. Do you know who gets a copy of that form?

A. I don't know. I really don't.

Q. All right, sir. Your company doesn't use such a form?

A. No, we don't.

Q. Let me hand you D-5, and that's captioned underwriting survey?

A. Yes.

Q. Are you familiar with D-5?

A. No, I'm not. You must remember these guys are my competitors.

Q. Y'all don't have a similar form that you use?

A. No, we really don't. Factory Mutual—well, let's put it this way, Factory Mutual and the IRI, which is their stock company competitor, use vey elaborate forms for this sort of thing. And these forms would apply to any risk. And, see, I'm a cotton underwriter, and I just wouldn't stumble into this sort of thing.

T-1186, L. 1-6

THE COURT: Well, the rule is that all witnesses were supposed to stay out of the Courtroom. I'm not going to say I'm not going to let him testify. I note in your objection, Ms. Roberson, that if I let him testify and the case comes out contrary to the way you see it to come out, of course, you'll have basis for a motion for a new trial.

T-1213, L. 5-16

Q. What did this involve at Plant Hatch concerning different regulatory agencies in relation to your work?

A. Well, we had to work right with nuclear people who—regulatory people, NRC, and we had to—when they'd have modifications of the sprinkler system. They had a shutdown which they would call—they had two units, and one unit was shut down. And this would be remodified, the sprinkler systems. If they remodified the pipes in the lines that lead into the reactor building—

THE COURT: Do we need to know all about that? This is not a nuclear plant here we're talking about. Ask him what you want to ask him about this case. Go on.

T-1132, L. 2-22

Q. Now, your degree is in mechanical engineering, is it not?

A. Yes, sir. But I'm a registered electrical engineer in five states.

Q. Just briefly what is the field of mechanical engineering. What does it include?

A. It includes plumbing, heating and air conditioning. That's the main field. A lot of people think of a mechanical engineer as an automotive engineer. That's one branch of mechanical engineering. But my particular branch was heat transfer, which got into heating and air conditioning, plumbing and nuclear reactors.

Q. And then you picked up a certification or license—are you licensed as an electrical engineer?

A. Yes. For the last twenty years, due to my—

THE COURT: Well, the answer is yes.

THE WITNESS: Yes, the answer is I'm licensed in five states as a registered professional electrical engineer. I took the electrical engineering exam.

THE COURT: So the answer is yes.

THE WITNESS: Yes.

T-1201, L. 10 through T-1203, L. 1

BY MR. McKINLEY:

Q. Mr. Gay, would you describe how many of those would've been at the warehouse? Would they have been around the warehouse at the time of the fire?

A. They would've been—based on the cotton there—of course, I might add when the cotton was salvaged these bands here did not break as readily as the wire baling bands. This was one of the reasons that in the picture you saw the cotton just fluffed over like a snowstorm, is because the wire will break a lot quicker in the heat.

MR. WITHERS: Your Honor—

THE COURT: He hasn't been qualified as any expert on which one would break first and which one would break next. You said you put him up there just to ask him if those things were at the warehouse, and he stated that. Now what else are you going to ask him?

BY MR. McKINLEY:

Q. Mr. Gay, I also show you this. Would this be related to what that is?

A. This is a band here, and Mr. Hatcher believes that some—

THE COURT: Mr. Hatcher believes—you can't testify about what Mr. Hatcher believes.

THE WITNESS: And I believe—

THE COURT: And you can't testify about what you believe. You can testify about facts. This man hasn't been qualified as an expert on—

THE WITNESS: Still—

THE COURT: Just a minute, just a minute.

THE WITNESS: All right, sir.

THE COURT: He hasn't been qualified as an expert in this business.

BY MR. McKINLEY:

Q. Mr. Gay, just tell us what that is.

A. This band was also found on the fire site.

Q. What was that used for in the warehouse at the time of the fire or prior to the fire?

A. It had cotton on it. So based on what we believed it was used on some of the cotton.

MS. ROBERSON: Objection to the witness testifying to what he believed, not what he knows.

T-1199, L. 21 through T-1200, L. 6;
T-1203, L. 17 through T-1204, L. 6

MR. McKINLEY: Defendant calls Earl Adams.

(Pause)

MR. McKINLEY: Your Honor, I'm informed Mr. Adams is scheduled to arrive here at 9:30, in eight minutes. I apologize he's not here at this minute.

THE COURT: Well, we're not going to wait on him. We're not going to wait on him. We don't wait on witnesses. What else do you have?

MR. McKINLEY: Mr. Gay, would you please take the stand?

Q. Mr. Gay, on this particular item, explained this as a baling wire or for cotton. And you mentioned you found cotton on these wires. Would you describe that? Is that shown on that?

A. Here's the cotton right here. Also there's some right here.

Q. Now, if you would also, please, would you describe what exactly this is and how that is used?

A. This is the buckle—

MS. ROBERSON: Your Honor, I object to this line of testimony as irrelevant to any issue—

THE COURT: I don't see any relevance—what are you doing, filibustering until your other witness gets here? Is that what you're doing? I noticed you were just looking at your watch.

T-1119, L. 25—T-1120, L. 14

MR. ECKL: Your Honor, may we approach the bench, counsel approach the bench?

(Conference at the bench)

BY MR. WITHERS:

Q. Mr. Donnelly, who hired you in this matter?

A. A Mr. Harold Brown.

Q. Where does he work?

MR. ECKL: Your Honor, may I approach the bench?

THE COURT: Well, you questioned the expert witnesses put on the stand by the other side about who employed them, even about how much they were paid an hour an so on. He would have the same right.

(Inaudible conversation)

THE COURT: Well, let's see. Take the jury to the jury room, Mr. Marshal.

T-19, L. 9-24

And there is an insurance company which is interested in this matter insofar as Coats and Clarke is concerned, and that insurance company is the Insurance Company of the State of Pennsylvania. Any member of the jury panel and officer of or an agent for or a stockholder in or an employee of the Insurance Company of the State of Pennsylvania? If so, would you stand and tell us about it at this time?

And there is another insurance company that is interested one way or another in the outcome of this case from the standpoint of defendant, Mr. Gay, and that is the Hanover Insurance Company. Is any member of the jury panel an officer of or an agent for or an employee of or a stockholder in the Hanover Insurance Company? If so, will you stand and tell us about it at this time?

T-1200, L. 18—T-1201, L. 20

BY MR. McKINLEY:

Q. Mr. Gay, I'm going to show you this item and ask you if you would please tell us what it is and whether that was at the fire scene at the time of the fire.

A. When the bales of cotton came in from Coats & Clark, they had two ways of banding them. One—the latest way and apparently it's cheaper because of buckles and so forth is—

MR. WITHERS: I object to the comment that it's cheaper—

THE COURT: I sustain the objection. The question was were things like this at the warehouse. Now, what's the answer to that?

THE WITNESS: The baling wire that you saw was there, and also the cotton had these on it. Up until 1982 I hadn't seen any of the baling wire. Everything came in had this band around it.

BY MR. McKINLEY:

Q. Mr. Gay, would you describe how many of those would have been at the warehouse? Would they have been around the warehouse at the time of the fire?

A. They would've been—based on the cotton there—of course, I might add when the cotton was salvaged these bands here did not break as readily as the wire baling bands. This was one of the reasons that in the picture you saw the cotton just fluffed over like a snowstorm, is because the wire will break a lot quicker in the heat.